LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 4 1970
JOHN F. DAVIS, CLERK

In the Supreme Court
of the United States

No. 1150

MAGGIE MAE GREEN, LYLE MILLER and JANE MILLER, husband and wife,

Petitioners,

v.

CHRIS L. WHEELER, State Engineer for State of Oregon,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

MARVIN S. NEPOM
314 Oregon Bank Bldg.
Portland, Oregon 97204
Attorney for Petitioners

LEO LEVENSON
Oregon Bank Bldg.
Portland, Oregon
JAMES K. GARDNER
Commercial Bldg.
Hillsboro, Oregon
JOHN C. CALDWELL
P. O. Box 1122
Oregon City, Oregon
Of Counsel

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 1-70

SUBJECT INDEX

Page

Opinion Below 2

Jurisdiction 2

Constitutional Provision Involved 2

Question Presented 3

1. Whether the revocation in 1960 of a permit issued in 1957 to appropriate ground water, without giving petitioners any notice and an opportunity to be heard, under the circumstances here, conflicts with the due process clause of the Fourteenth Amendment, as previously construed in applicable decisions of this Court?

2. Whether due process required respondent to give petitioners notice that he had—but unknown to petitioners, revoked the permit in 1960, where respondent had inspected petitioners' well and knew of their use of water from 1961 through 1966, and especially where respondent closed the area to further water appropriation?

Statement of Case 3

Reasons for Granting Writ 7

Conclusion 12

Appendix "A"—Opinion Oregon Supreme Court .. 15

Appendix "B"—Oregon Revised Statutes 24

CITATIONS

Page

Cases:

Covey v. *Town of Summers*, 351 U.S. 141, 76 S. Ct. 724, 100 L. Ed. 1421 8

Lambert v. *People of the State of California*, 355 U.S. 225, 78 S. Ct. 240, 2 L. Ed. 2d 228 8

Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L. Ed. 865 11

Schroeder v. *City of New York*, 371 U.S. 208, 83 S. Ct. 279, 9 L. Ed. 2d 255 11

In the Supreme Court
of the United States

No.....

MAGGIE MAE GREEN, LYLE MILLER and JANE MILLER, husband and wife,

Petitioners,

v.

CHRIS L. WHEELER, State Engineer for State of Oregon,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners Maggie Mae (Redwine) Green, Lyle Miller and Jane Miller, his wife, respectfully, pray a Writ of Certiorari issue to review a judgment of the Supreme Court of the State of Oregon in the above cause entered September 24, 1969 affirming a trial court judgment upholding an order of the respondent State Engineer Chris L. Wheeler, cancelling a permit issued in 1957 to appropriate for beneficial use 1.57

cubic feet per second of water for irrigation of petitioners' Oregon farm.

OPINION BELOW

The opinion of the Supreme Court of Oregon is reported in 89 Adv. Sh. 289, — Or —, 458 P.2d 938 (1969) and appears in Appendix "A" of this petition at page 15.

JURISDICTION

The judgment of the Supreme Court of Oregon was entered on September 24, 1969. A petition for rehearing was denied November 18, 1969.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION

Amendment XIV, United States Constitution, Section 1, Clause 2: ". . . nor shall any State deprive any person of . . . property without due process of law . . . ."

STATUTES INVOLVED

This case involves the Oregon Ground Water Act of 1955 and the pertinent sections are: ORS 537.260, ORS 537.625, ORS 537.630, ORS 537.635, ORS 537.665, ORS 537.705 and ORS 537.720. These sections are reproduced in appendix.

QUESTIONS PRESENTED

1. Whether respondent may consistent with due process required by the Fourteenth Amendment to the United States Constitution, without any notice to petitioners and afford them an opportunity for a hearing, summarily deny their appropriation of ground water by enforcing a 1960 order revoking a permit issued in 1957, under the terms of which an 800 foot well was dug and water appropriated for beneficial use for nine consecutive years with the full knowledge and acquiescence of respondent.

2. Whether the due process clause required respondent to give petitioners notice that he had—but unknown to petitioners—revoked the permit in 1960 and afford them an opportunity to be heard before summarily shutting off their appropriation of water and closing the area to further appropriation, where respondent had inspected petitioners' well and their continued use of water from 1961 through 1966.

STATEMENT OF THE CASE

Petitioner Maggie Mae (Redwine) Green is the vendor, and petitioners Lyle Miller and his wife Jane Miller, are the vendees of 200 acres of farmland situate in Umatilla County, Oregon.

Prior to the death of G. W. Redwine, Maggie's former husband, and on March 29, 1957 he made application to respondent's predecessor, State Engineer

of the State of Oregon, to construct a well and appropriate ground water for 125 acres of his farm. The application was approved and Permit G-527 issued to Redwine. The permit required construction of the well to commence on or before May 20, 1958, and be completed on or before October 1, 1958, and the water applied to beneficial use by irrigation on or before October 1, 1959. The approval of an application constitutes a permit to appropriate ground water and apply to the beneficial use.

Drilling of the well was completed on March 10, 1958. A well log was filed with the State Engineer and water was applied after March 10, 1958 and prior to July 2, 1958, to approximately 30 of the 125 acres described in the permit.

During the latter part of June, 1958, Redwine became ill and died July 7, 1958. Petitioners Lyle and Jane Miller, at the time of their purchase agreement, were informed the well was completed and all they would be obliged to do to obtain adequate water was to install a larger pump. Representations were made that a water certificate had been perfected; that nothing further needed be done by the Millers in connection with the right to water.

After Millers took possession of the property in 1958, it was discovered the well pumped large amounts of sand. During the next two years Millers employed well diggers and expended $3,500 in eliminating sand, they expended an additional sum of approximately $16,000 for irrigation equipment. Water has continu-

ously been appropriated since the Spring of 1961 to beneficial use of the entire farm.

Notwithstanding Redwine's death July 7, 1958, the Office of Respondent State Engineer on October 8, 1958, mailed Redwine a postcard, and a year later on October 8, 1959, another postcard, notifying Redwine to return a notice of completion of the well and the beneficial use of water. The postcards were not returned to the State Engineer, for neither did Maggie Redwine Green and the Millers receive either of the postcards. On January 11, 1960, the State Engineer mailed Redwine, Hermiston, Oregon, by certified mail, a "notice of proposed cancellation." This notice was returned by the post office to the State Engineer unclaimed. No further effort or investigation was made by the State Engineer to give any notice of the proposed cancellation, and particularly to the petitioners Millers, who at all times were in possession of and residing upon their farm.

The State Engineer employed a watermaster and other representatives in the area of petitioners' farm who periodically inspected and measured wells and water use. They periodically observed petitioners' appropriation of water from 1961 to 1966. They believed petitioners held water rights under Permit No. G-527 which was issued to Redwine. Respondent's representatives inspected petitioners' well January 26, 1961; they measured the water semi-annually thereafter until 1965, and made a permanent record of the type of pump, the dates the well was being used, and the

water table. Respondent at no time gave any notice to petitioners that Permit No. G-527 issued in 1957, had been cancelled August 9, 1960. In June of 1966 respondent closed the area to further appropriation of water.

On May 8, 1967, respondent summarily shut off petitioners' appropriation of water. Petitioners filed suit in the state court, obtained a temporary injunction, and turned on pumps. Petitioners prayed for a decree declaring that respondent's order cancelling Permit G-527 on August 9, 1960, be declared null and void, set aside and rescinded; that it be declared the cancellation of the permit constituted a deprivation of petitioners' rights and property without due process of law and a violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, as well as a violation of the State Constitution.

The federal question sought to be reviewed was raised by petitioners in their opening brief to the Supreme Court of Oregon.

In passing on the question, the Court said:

> "Plaintiffs argue that the notice sent to Redwine which was returned to the State Engineer undelivered and unopened did not constitute reasonable notice to plaintiffs and therefore did not fulfill the constitutional requirement of procedural due process.
>
> "The notice was sent to the permittee at the address given to the State Engineer by Redwine.

It is contended that upon the return of the letter with the notation that it was 'unclaimed,' the State Engineer should have made further effort to give notice of the proposed cancellation. The contention is without merit. Whether under some circumstances something more than the mailing of notice may be required of an administrative office to effect adequate notice we need not now decide. Here, plaintiffs failed to receive the notic as a consequence of their own neglect. The applicant for a water right is charged with knowledge of the requirements imposed by the statutes in perfecting a water right. It is applicant's duty not the State Engineer's to see that these requirements have been fulfilled. ORS 537.635 provides that a permit issued by the State Engineer may be assigned 'but no such assignment shall be binding, except upon the parties thereto, unless filed for record in the office of the State Engineer.' Plaintiff did not record the assignment to them of the permit from Redwine. If they had recorded the assignment the State Engineer would have sent the notice to them rather than to Redwine. They cannot now complain of a lack of notice resulting from their own dereliction."

REASONS FOR GRANTING WRIT

Point I

The cancellation in 1960 of Permit G-527 issued in 1957, without giving petitioners any notice or an opportunity for a hearing, is a denial of due process and conflicts with the Fourteenth Amendment as previously construed by this Court.

That the right of the State to reasonable control of all the water within the State is not disputed.

But as said by this Court in *Lambert* v. *Peoples of the State of California*, 355 U.S. 225, 78 S. Ct. 240, 2 L. Ed. 2d 228:

> "Notice is required in a myriad of situations where a penalty for forfeiture might be suffered for a mere failure to act."

Respondent cancelled the permit in 1960 for his failure to receive information from Redwine that the water was being applied to a beneficial use. This order of cancellation was taken without any notice to the petitioners, or an opportunitly to be heard despite the fact they were in possession of the farm. The ultimate notice of respondent's proposed action was mailed January, 1960 by certified mail to the deceased Redwine, who had died in 1958. The notice was returned to respondent unopened and undelivered. Redwine's probate was a matter of public record in the county where the farm is located.

In *Covey* v. *Town of Summers*, 351 U.S. 141, 76 S. Ct. 724, 100 L. Ed. 1021, this Court noted:

> "Notice to a person known to be an incompetent who is without the protection of a guardian, does not measure up to the requirement of due process."

Notwithstanding the order of cancellation, respondent had inspected, measured and recorded the petitioners' continuous use of water from 1961 to 1966. In 1966, after he had suspended issuance of ad-

ditional permits for further appropriation of water for the first time, he then notified petitioners of his 1960 order of cancellation.

The only excuse for the procedure of notice by mail is the convenience and savings over actual delivery of notice. It is submitted, notice to a dead man is a dead letter and particularly when the letter is returned unopened and undelivered. The presumption of reasonable or suitable notice by mailing is conclusively overcome.

We submit that here the notice was given to a dead man without any regard to or for the practicality or peculiarities of either of the individual case or the kind of cases which arise. Initially the beneficial use of water was lawful. To cancel this lawful use, in good conscience, should require actual notice to those in open possession of the farm using the water. Fundamentally, possession of land is notice to the world of every right that the possessor has therein, legal or equitable.

The Oregon Legislature recognized this principle in ORS 537.720 but the lower Court held ORS 537.260 was applicable and disregarded the distinction between use (possession) of water under a valid permit and the failure to develop and use the water.

Point II

Failure of respondent to give any prior notice of the 1960 order cancelling the permit until after he had suspended further appropriation of water from

the ground water reservoir, is a denial of due process of law.

Notwithstanding the 1960 order of cancellation which, if valid, made further use of the water unlawful, the respondent had inspected, measured and recorded petitioner's use of water. This study was made from 1961 to 1966 as part of a general ground water study in the State of Oregon to identify and define the location, extent, depth and other characteristics of the various ground water reservoirs within the state. The purpose was to determine when to restrict further appropriation and to determine the relative right and priorities of appropriators.

In November of 1966, the respondent, after suspending the further appropriation of water in the area, notified petitioners of the 1960 order of cancellation. Petitioners commenced this proceeding and in 1967 the respondent summarily shut off petitioners' water. Petitioners obtained a temporary injunction, posted a $10,000 bond and had the water turned on.

The court below reckoned that because of petitioners' neglect to file an assignment of the 1957 permit they were doomed and cannot complain of a lack of notice resulting from their own dereliction, despite the fact that ground water used is appurtenant to the land.

The court below also ruled:

> "It may not have been unreasonable for the plaintiffs to assume inspection of their well meant the permit was in good standing. But the inspec-

tion of the well was part of a general study of ground water supply in Oregon and cannot be regarded as a representation upon which to predicate an estoppel."

The question in this case is one of fundamental fairness and due process. It involves the standard of fundamental fairness owed by a state to its citizens. Approval has been given below for the destruction of a farm valued at $59,000 plus expenditures of $3,500 for improving the well and $16,000 for additional irrigation equipment.

This Court recognized the principle in *Mullane* v. *Cent. Hanover Bank*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865, that fair play is the essence of due process. Here the respondent arbitrarily revoked petitioners' lawful appropriation of water because Redwine had not returned a confirmation of completion of the well. Notwithstanding, respondent knew the well was completed and water appropriated. Furthermore, respondent utilized this knowledge to reach the conclusion six years later that no more water should be appropriated. For six consecutive years respondent inspected the well while the area was open to appropriation of water. It was only after he concluded to suspend further appropriation of ground water did he inform petitioners their right to water had been revoked in 1960.

The decision of the court below is in direct conflict with the rule reaffirmed in *Schroeder* v. *City of New York*, 371 U.S. 208, 83 S. Ct. 279, 9 L. Ed. 2d 255 (1962):

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated *under all the circumstances to apprise interested parties of the pendency of the action* and afford them an opportunity to present their objections." (emphasis added)

We have been unable to discover any statute of another state or a decided case permitting an arbitrary cancellation of a lawful permit without knowledge and an opportunity to be heard where water is being actually applied in accordance with the permit.

Oregon has failed to provide any remedy which a user of water under a valid permit who does not receive any notice of cancellation could reopen the case and be heard. The state has failed to provide any remedy which a user of water under a permit cancelled without notice but which the state has treated as valid for six years could reopen the case and be heard before he is foreclosed from appropriating water. These circumstances so shock the conscience as to amount to a severe violation of due process which merits a review by this Court.

CONCLUSION

This petition should be granted to remedy a wrong in taking petitioners' property without due process of law. Respondent knew that petitioners were in possession of the farm and appropriating water pursuant to the 1957 permit. The least respondent could have done

was to have his local watermaster notify petitioners of the requirement to return the notice of completion of the well. Since the local watermaster knew the well was completed, returning the notice would be superfluous.

Respectfully submitted,

MARVIN S. NEPOM
314 Oregon Bank Bldg.
Portland, Oregon
Attorney for Petitioners

LEO LEVENSON
Oregon Bank Bldg.
Portland, Oregon

JAMES K. GARDNER
Commercial Bldg.
Hillsboro, Oregon

JOHN C. CALDWELL
P. O. Box 1122
Oregon City, Oregon
Of Counsel

APPENDIX A

No. 9264—September 24, 1969

IN THE SUPREME COURT OF THE STATE OF OREGON

IN BANC

GREEN et al, *Appellants*, *v.* WHEELER et al, *Respondents.*

Appeal from Circuit Court, Umatilla County.

WILLIAM W. WELLS, Judge.

Argued and submitted at Pendleton, May 5, 1969.

James K. Gardner, Hillsboro, argued the cause for appellants. With him on the briefs were Leo Levenson, Portland, and John C. Caldwell, Oregon City.

Louis S. Bonney, Assistant Attorney General, Salem, argued the cause for respondent State Engineer. With him on the briefs was Robert Y. Thornton, Attorney General, Salem.

Gene B. Conklin, Pendleton, argued the cause for respondents Ernest R. and Waldo H. Cramer and Leota Martin.

Respondents M. M. and F. F. McDole filed an answering brief pro se.

Before PERRY, Chief Justice, and MCALLISTER, SLOAN, O'CONNELL, GOODWIN, DENECKE and HOLMAN, Justices.

AFFIRMED.

O'CONNELL, J.

This is a suit for a declaratory judgment in which plaintiffs seek a decree declaring null and void an

order of the State Engineer cancelling plaintiffs' permit to appropriate certain ground waters. Plaintiffs appeal from a decree sustaining the State Engineer's order.

On March 29, 1957, G. W. Redwine applied to the State Engineer for a permit to construct a well and appropriate ground water to 125 acres of the applicants' lands in Umatilla County. The mailing or post office address on the application was stated as "Hermiston, Oregon." The application was returned to Redwine at that address for some corrections and the application was subsequently sent back to the State Engineer's office with the corrections made.

On May 20, 1957, permit No. G-527 was issued to Redwine for construction of a well. The terms of the permit required that construction commence on or before May 20, 1958, that the construction be completed on or before October 1, 1958, and that the water be applied to a beneficial use on or before October 1, 1959.[1]

On March 13, 1958, a Water Well Report was filed with the State Engineer's office on behalf of Redwine by the driller showing that the well had been completed.

In June, 1958 G. W. Redwine and his wife began negotiations to sell the property in question to plaintiffs Lyle and Jane Miller. Representations were made by the Redwines to the plaintiff purchasers

[1] ORS 537.625 provides, in part, that:

"* * * If the application is approved, the indorsed application constitutes a permit to appropriate the ground water, and the applicant, upon receipt thereof, may withdraw the ground water and apply it to a beneficial use. * * *"

that a water certificate had been perfected on the well and that nothing further need be done. The property was sold to the Millers on July 2, 1958. They took possession of the property on July 4, 1958.[2] Mr. Redwine died on July 7, 1958.

Plaintiffs did not record the assignment of the permit as required by ORS 537.220.[3]

Not having received the information showing completion of the well on October 1, 1958, as required by ORS 537.630 and by the terms of the permit, the State Engineer, on October 8, 1958, mailed a postal card to Redwine addressed to Hermiston, Oregon, his address of record, purporting to notify Redwine that the time for completion of construction by October 1, 1958 had expired and that Redwine should either notify the State Engineer of completion of construction or request an extension of time. As we have noted above, Redwine had died prior to this time. The postal card was not returned.

On October 8, 1959, another postal card was mailed to G. W. Redwine at Hermiston, Oregon purporting to notify him that the time had expired for applying the water to a beneficial use and that the permittee should notify the State Engineer of such use or request an

---

[2] When the Millers took possession of the property they discovered that the well pumped large amounts of sand preventing the irrigation they had contemplated. During the next two years they employed two separate well drillers and expended $3,500 in eliminating the sand. They expended an additional $16,000 in irrigation equipment to apply the water to the land.

[3] ORS 537.220 provides:

"Any permit or license to appropriate water may be assigned, subject to the conditions of the permit, but no such assignment shall be binding, except upon the parties thereto, unless filed for record in the office of the State Engineer."

extension of time or to notify the State Engineer if the permit should be cancelled. This postal card was not returned.

On January 11, 1960, pursuant to ORS 537.260 (1), the State Engineer mailed a "Notice of Proposed Cancellation," by certified mail to G. W. Redwine, Hermiston, Oregon, his address of record. On January 15, 1960 this letter was returned "unclaimed' ' to the State Engineer after delivery had been attempted at two additional addresses at which Mrs. Redwine had resided at various times subsequent to her husband's death in July, 1958.

On August 9, 1960, permit No. G-527 was cancelled by the State Engineer. On August 15, 1960, a postal card was mailed by the State Engineer to Redwine at Hermiston, Oregon stating that the permit had been cancelled. This postal card was never returned to the State Engineer.

In November, 1966 the Millers were notified by the watermaster that they probably would not be permitted to use the water until their alleged water right was "straightened up." Plaintiffs Miller and Mrs. Redwine then brought this suit to obtain a declaration of their rights.

Plaintiffs contend that when the State Engineer approved Redwine's application in 1957 and issued Permit No. G-527, Redwine was entitled to appropriate ground water subject to the conditions stated in the permit which, it is claimed, were met when the Well Driller's Report was filed with the State Engineer. It is argued that once the permit was issued and the water was applied to the 30 acres the permittee acquired a vested property right to appropriate ground

water, and that the permittee can be deprived of this vested right only if the procedure in ORS 537.720 is followed. ORS 537.720 provides as follows:

> "Whenever, after notice to and opportunity to be heard by such holder, the State Engineer finds that the holder of any permit or certificate of registration issued under ORS 537.505 to 537.795 is wilfully violating any provision of such permit or certificate of registration or any provision of ORS 537.505 to 537.795, the State Engineer may cancel or suspend such permit or certificate of registration or impose conditions on the future use thereof to prevent such violation."

Apparently plaintiffs would contend that even in the absence of such a statute they would be entitled to notice and hearing under the due process clause of the Fourteenth Amendment of the Constitution of the United States and Article I, Sections 10 and 18 of the Oregon Constitution.

We shall first consider plaintiffs' contention that ORS 537.720 is the controlling statute. This section provides for the cancellation of a permit or certificate only if there is a wilfull violation of the permit, certificate, or certain provisions of the water code. However, this is not the only statute providing for the cancellation of a permit. ORS 537.260 (1) provides as follows:

> "Whenever the time within which any appropriation under a permit should have been perfected has expired and the owner of the permit fails or refuses within three months thereafter to submit to the State Engineer proof of completion of the appropriation as required by ORS 537.230 and 537.250, the State Engineer may,

after 60 days' notice by registered mail, order the cancellation of the permit. The cancellation shall have the same force and effect as cancellation of a permit in the proceedings provided for in ORS 537.410 and 537.450."

Plaintiffs argue that ORS 537.260 (1) is applicable only to a case where a permit is issued but no beneficial use of the water has yet been made under the permit; at this stage the right is *inchoate* only. They contend that immediately upon the application of the water to a beneficial use the right becomes *vested* and at this stage ORS 537.260(1) does not apply, and ORS 537.720 becomes applicable.

The trial court held that the permit was inchoate and not vested until the permittee fully complied with all of the statutory specifications. We agree with this interpretation of the water code. It seems clear to us that the legislative assembly intended the water right certificate, not the permit, even when followed by a beneficial use, to mark the point at which a water right becomes vested. Prior to the water code of 1909 the appropriation of water in Oregon was recognized as a method of creating a vested interest in the waters of a stream. But the adoption of the water code introduced a new concept of establishing one's right to water. All waters in Oregon were declared to belong to the public subject to existing rights (ORS 537.110) and although such waters were declared to be subject to appropriation, they were appropriable only "as provided in the Water Rights Act and not otherwise. . . ." (ORS 537.120.) Appropriation alone was no longer enough to establish a vested right in the waters of the state; the water code required, and still requires, the fulfillment of other conditions before a

water right will vest in the appropriator. Various sections of the water code make this clear. The plan of the statute is to recognize vested rights in water not simply where there is an appropriation but when the "appropriation has been perfected." Thus ORS 537.250 provides that a water right certificate shall be issued upon it appearing to the satisfaction of the State Engineer "that an appropriation *has been perfected in accordance with the provisions of the Water Rights Act.*" (Emphasis added.) ORS 537.630, which puts a time limit on the beginning and completion of construction of a well, is to the same effect providing that "upon receipt of proof satisfactory to the State Engineer that an appropriation *has been perfected in accordance with the provisions of ORS 537.505 to 537.795* he shall issue a ground water right certificate * * *." (Emphasis added.)[4] If the requirements for the perfection of an appropriation are not met the State Engineer may cancel the permit, and it is to be noted that ORS 537.630(4) provides that "the procedure for cancellation of a permit shall be as provided in ORS 537.260" and not, as plaintiffs contend, under the procedure set out in ORS 537.720.

Plaintiffs argue that the notice sent to Redwine which was returned to the State Engineer undelivered and unopened did not constitute reasonable notice to plaintiffs and therefore did not fulfill the constitutional requirement of procedural due process.

---

[4] An appropriation is not perfected unless there is compliance with ORS 537.630, which provides that:

"* * * [T]he permit holder shall file a certificate of such completion with the State Engineer, disclosing the depth, diameter and type of each well, and the kind and amount of the casing; the capacity of the well pump in gallons per minute and the drawdown thereof; and such other information as the State Engineer deems necessary."

The notice was sent to the permittee at the address given to the State Engineer by Redwine. It is contended that upon the return of the letter with the notation that it was "unclaimed," the State Engineer should have made further effort to give notice of the proposed cancellation. The contention is without merit. Whether under some circumstances something more than the mailing of notice may be required of an administrative office to effect adequate notice we need not now decide. Here, plaintiffs failed to receive the notice as a consequence of their own neglect. The applicant for a water right is charged with knowledge of the requirements imposed by the statutes in perfecting a water right. It is applicant's duty not the State Engineer's to see that these requirements have been fulfilled. ORS 537.635 provides that a permit issued by the State Engineer may be assigned "but no such assignment shall be binding, except upon the parties thereto, unless filed for record in the office of the State Engineer." Plaintiff did not record the assignment to them of the permit from Redwine. If they had recorded the assignment the State Engineer would have sent the notice to them rather than to Redwine. They cannot now complain of a lack of notice resulting from their own dereliction.

Finally, it is argued that the State Engineer is estopped to claim that "he never received notice of Redwine's appropriation of the water pursuant to the permit, when he had knowledge the water was actually appropriated to a beneficial use" and he "led the plaintiffs to believe the appropriation of the water was lawful." Plaintiffs base the alleged estoppel on the fact that members of the State Engineer's staff measured the water levels in the well in question and reported to the State Engineer's office information as

to the water table, the type of pump, the dates the well was being pumped. The inspection plaintiffs describe was a part of a study made by the ground water investigation section of the State Engineer's office to determine ground water characteristics. Plaintiff's well was one of approximately 800 wells throughout the state. We are unable to see how an estoppel can be created out of such circumstances. It may not have been unreasonable for plaintiffs to assume that the inspection of their well meant that their permit was in good standing. But the inspection of the well was a part of a general study of the ground water supply in Oregon and cannot be regarded as a representation upon which to predicate an estoppel.

The decree of the trial court is affirmed.[5]

---

[5] For a case closely in point, see Mosby Irrigation Company v. Criddle, 11 Utah2d 41, 354 P2d 848 (1960).

APPENDIX B

Oregon Revised Statutes

537.260 *Cancellation of permit for failure of proof of completion of work; issuance of limited certificate, contest of issuance of certificate.* (1) Whenever the time within which any appropriation under a permit should have been perfected has expired and the owner of the permit fails or refuses within three months thereafter to submit to the State Engineer proof of completion of the appropriation as required by ORS 537.230 and 537.250, the State Engineer may, after 60 days' notice by registered mail, order the cancellation of the permit. The cancellation shall have the same force and effect as cancellation of a permit in the proceedings provided for in ORS 537.410 to 537.450.

537.625 *Application with approval indorsed thereon constitutes permit; effect of approval or rejection.* (1) The approval or rejection of an application for a permit referred to in ORS 537.615 shall be indorsed thereon and a record of such indorsement shall be made in the office of the State Engineer. The indorsed application shall be returned immediately to the applicant. If the application is approved, the indorsed application constitutes a permit to appropriate the ground water, and the applicant, upon receipt thereof, may withdraw the ground water and apply it to beneficial use. If the application is rejected, the applicant shall not withdraw or use the ground water so long as the rejection continues in effect.

(2) A right to appropriate ground water under a permit has a priority from the date when the appli-

cation was filed with the State Engineer (1955 c. 708, § 11; 1959 c. 437, § 4).

537.630 *Construction work under permit; certificate of completion; ground water right certificate.* (1) Actual construction of any well or other means of developing and securing the ground water shall begin not later than one year after the date of approval of the application for a permit under ORS 537.625, and such construction shall thereafter be prosecuted with reasonable diligence and be completed within a reasonable time fixed in the permit, not to exceed two years after the date of approval of the application. The State Engineer, for good cause shown, may order and allow an extension of time, including an extension beyond the two-year period, for the completion of the well or other means of developing and securing the ground water or for complete application of water to beneficial use.

(2) If the construction of any well or other means of developing and securing the ground water is completed after the date of approval of the application for a permit under ORS 537.625, within 30 days after such completion, or if such construction is completed before such date of approval, within 30 days after such date of approval, the permit holder shall file a certificate of such completion with the State Engineer, disclosing the depth to the water table; the depth, diameter and type of each well, and the kind and amount of the casing; the capacity of the well pump in gallons per minute and the drawdown thereof; and such other information as the State Engineer deems necessary.

(3) Upon receipt of proof satisfactory to the State Engineer that an appropriation has been perfected in

accordance with the provisions of ORS 537.505 to 537.795, he shall issue a ground water right certificate of the same character as that described in ORS 537.700. The certificate shall be recorded and transmitted to the applicant as provided in said section.

(4) The procedure for cancellation of a permit shall be as provided in ORS 537.260 [1955 c. 708, § 12; 1959 c. 437, § 5].

537.635 *Assignment of certificate of registration or permit.* Any certificate of registration issued under ORS 537.610 or permit issued under ORS 537.625 may be assigned, subject to the conditions of the certificate of registration or permit, but no such assignment shall be binding, except upon the parties thereto, unless filed for record in the office of the State Engineer [1955 c. 708, § 13].

537.665 *Investigation of ground water reservoirs; defining characteristics and assigning names and numbers.* The State Engineer or his authorized assistant shall proceed as rapidly as possible to identify and define tentatively the location, extent, depth and other characteristics of each ground water reservoir in this state, and shall assign to each a distinctive name or number or both as a means of identification. The State Engineer or his authorized assistant may make such investigation and gather such data and information as may be essential to a proper understanding of the characteristics of each ground water reservoir and the relative rights to appropriate ground water therefrom. Before any final determination of boundaries and depth of any ground water reservoir, the State Engineer shall proceed to make a final determination of the rights to appropriate

the ground water of the ground water reservoir under ORS 537.670 to 537.695 (1955 c. 708, § 14).

537.705 *Ground water appurtenant; change in use, place of use or point of appropriation.* All ground water used in this state for any purpose shall remain appurtenant to the premises upon which it is used and no change in use or place of use of any ground water for any purpose may be made without compliance with a procedure as nearly as possible like that set forth in ORS 540.520 and 540.530. However, the owner of any ground water right may, upon compliance with a procedure as nearly as possible like that set forth in ORS 540.520 and 540.530, change the use and place of use, the point of appropriation or the use theretofore made of the ground water in all cases without losing priority of the right theretofore established [1955 c. 708, § 22].

537.720 *Violation of terms of law or permit or certificate; action by State Engineer.* Whenever, after notice to and opportunity to be heard by such holder, the State Engineer finds that the holder of any permit or certificate of registration issued under ORS 537.505 to 537.795 is wilfully violating any provision of such permit or certificate of registration or any provision of ORS 537.505 to 537.795, the State Engineer may cancel or suspend such permit or certificate of registration or impose conditions on the future use thereof to prevent such violation [1955 c. 708, § 24].